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Bray v. Alexandria Women's Health Clinic: "Rational Objects of Disfavor" as a New Weapon in Modern Civil Rights Litigation

*Liberty finds no refuge in a jurisprudence of doubt.*¹

As the debate over the morality of abortion rages on in classrooms, churches, and legislatures throughout the country,² women in cities throughout America are under siege. Between 1977 and 1990, the National Abortion Federation (NAF) collected reports of 829 acts of violence directed at abortion clinics: "34 were bombed, 52 were targets of arson, 43 were targets of attempted bombings and arson,"³ 266 were invaded,⁴ 269 were vandalized, and 22 were burglarized.⁵ In addition, there were 64 reports of assault and battery, 77 death threats and 2 kidnappings.⁶ Just this year, the violence at abortion clinics escalated to include one murder⁷ and one attempted murder.⁸

A tactic anti-abortion activists increasingly use is to assemble large groups of protesters who converge unexpectedly on selected women's health clinics to form a human blockade, preventing patients, doctors, and nurses from gaining access to the clinic.⁹ In many cases, these "rescuers"

1. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992) (plurality opinion).

2. For a thorough discussion of the history of the abortion debate in this country and abroad, the legislative treatment of abortion, and the judicial responses thereto, see generally LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

3. Brief for the National Abortion Federation and Planned Parenthood Federation of America, Inc. as amici curiae in support of Respondents at 4-5, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985). These figures were compiled for and published in the NAF databases *INCIDENTS OF VIOLENCE & DISRUPTION AGAINST ABORTION PROVIDERS* and *ANTI-ABORTION VIOLENCE: INCIDENTS OF ARSONS, BOMBINGS & ATTEMPTS, 1977-1990*.

4. For an example of an "invasion," see Brief for the National Abortion Federation and Planned Parenthood Federation of America, Inc. at 11, *Bray* (No. 90-985):

When Operation Rescue arrived [at the Vermont Women's Health Clinic], three of its members, posing as legitimate patients, gained entry into the clinic. Immediately thereafter, a dump truck arrived, blocked the driveway and unloaded 54 shouting protesters who invaded the building.

They knocked the clinic director to the floor . . . [and prevented him] from reaching a telephone until they were sure that the lines had been cut. They joined together with bicycle locks and chained themselves to the clinic's furniture and doors.

5. *Id.* at 4-5.

6. *Id.*

7. William Booth, *Doctor Killed During Abortion Protest; Alleged Gunman Calmly Surrenders to Police Outside Florida Clinic*, WASH. POST, Mar. 11, 1993, at A1.

8. *Abortion Doctor Shot by Woman During Protest at Kansas Clinic*, WASH. POST, Aug. 20, 1993, at A17.

9. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part & vacated in part*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). In its literature, Operation Rescue defines "rescues" as "*physically* blockading abortion mills with [human] bodies, to intervene between abor-

are so numerous and so well trained in tactics of delaying the arrest and legal process that local law enforcement officials are overwhelmed and incapable of responding effectively.¹⁰

In response to this rising tide of violence, women whose access to medical care is threatened and citizens who support them have sought a federal remedy that goes beyond, and provides more effective relief than, the laws of individual states.¹¹ In *Bray v. Alexandria Women's Health Clinic*,¹² the Supreme Court addressed whether the actions taken by Operation Rescue and its members constituted a conspiracy "for the purpose of depriving, either directly or indirectly, any class of persons of the equal protection of the laws," in violation of 42 U.S.C. § 1985(3).¹³ Under that section,

[I]f two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery

tionists and the innocent victims." *Id.* at 1488 (quoting OPERATION RESCUE NATIONAL DAY OF RESCUE—OCTOBER 29, 1988 (1988)).

10. As an example, on October 29, 1988, demonstrators succeeded in closing Commonwealth Women's Health Clinic in Falls Church, Virginia, for more than six hours. Despite having arrested 240 rescuers, the town's 30-member police force was unable to keep the clinic open. *Id.* at 1489 n.4. Tactics employed by the demonstrators on this and other occasions to block access to the targeted clinic include parking cars across the entrance and deflating their tires, and scattering nails on the parking lot and adjoining public streets. *Id.* at 1489-90. In addition, once arrested, rescuers often refuse to give their real names to police, forcing law enforcement officials to release the protestors or to hold them overnight in crowded jails. Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as amici curiae in support of Respondents at 8, *Bray* (No. 90-985) (enumerating tactics employed by Operation Rescue demonstrators and the effect of these tactics on states' abilities to maintain law and order).

11. See Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as amici curiae in support of Respondents at 11, *Bray* (No. 90-985) ("[C]ompelling reasons exist for securing this meaningful federal remedy in the arsenal of remedies available to curtail and redress the harms of conspiracies such as the one at issue."). See generally Elizabeth L. Crane, Comment, *Abortion Clinics and Their Antagonists: Protection from Protesters Under 42 U.S.C. § 1985(3)*, 64 U. COLO. L. REV. 181 (1993) (arguing that § 1985(3) is broad enough to protect women who are physically deprived of their fundamental right to abortion and that to hold otherwise would impose on women the almost insurmountable burden of vindicating their rights through piecemeal state-law-based litigation).

12. 113 S. Ct. 753 (1993).

13. *Id.* at 757-58 n.1.

of damages occasioned by such injury or deprivation, against any one or more of the conspirators.¹⁴

The Court ruled that abortion is not an irrational object of disfavor, and thus opposition to it does not support an inference of discriminatory purpose from disparate impact in this situation.¹⁵ Hence, the "class-based invidiously discriminatory animus" that the Court has interpreted § 1985(3) to require¹⁶ was not present in *Bray*.¹⁷

This Note explores the scope and potential effects of the "irrational object of disfavor" test the Court used to justify its refusal to infer a discriminatory purpose.¹⁸ Second, this Note analyzes the possible effects of the "irrational object of disfavor" test on access to abortion after the 1992 landmark decision of *Planned Parenthood v. Casey*.¹⁹ Finally, the Note agrees with Justice Stevens's dissent and concludes that the *Bray* Court has injected an improperly subjective test into civil rights jurisprudence and has created a new weapon for those whose subjective prejudices and invidious purposes can be masked behind a purportedly rational explanation.²⁰

On November 8, 1989, the health clinics in *Bray*²¹ sought and obtained a temporary restraining order prohibiting Operation Rescue and its members²² from staging a physical blockade of abortion clinics in the Northern Virginia area.²³ On November 16, 1989, the United States District Court

14. 42 U.S.C. § 1985(3) (1988). This section is the surviving version of the Civil Rights Act of 1871 (Ku Klux Klan Act), § 2, ch. 22, 17 Rev. Stat. 13 (1873).

15. *Bray*, 113 S. Ct. at 760.

16. See *infra* notes 68-72 and accompanying text.

17. See *infra* notes 37-45 and accompanying text.

18. See *infra* notes 120-36 and accompanying text.

19. 112 S. Ct. 2791 (1992). In *Casey*, the United States Supreme Court reaffirmed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), which recognized the right of abortion; the *Casey* plurality held that states may not unduly burden a woman's right to abortion. *Casey*, 112 S. Ct. at 2820-21; see also *infra* notes 137-45 and accompanying text.

20. *Bray*, 113 S. Ct. at 788 (Stevens, J., dissenting) ("The Court's view requires a subjective judicial interpretation inappropriate in the civil rights context, where what seems rational to an oppressor seems equally irrational to a victim."); see also *infra* notes 154-62 and accompanying text.

21. The plaintiffs in *Bray* (referred to in the text as the "health clinics") were nine clinics that offer abortion services and/or counseling and five organizations that "seek to establish and preserve women's right to obtain abortions." *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1487 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part & vacated in part*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). The NAF was dismissed as a plaintiff for failure to identify itself or establish a cause of action. *Id.*

22. The defendants (referred to in the text as "Operation Rescue" or "Operation Rescue and its members") were Operation Rescue, the sole organizational defendant, and six individuals active in planning and orchestrating "rescue" demonstrations. *Id.* at 1487-88.

23. *Id.* at 1497. The district court specifically excluded from the injunction purely expressive activities within the defendants' First Amendment rights. *Id.*; accord *National Org. for Women*, 914 F.2d at 586 (holding that the "[t]he district court was within its discretion in declining to extend the injunction in a manner that would interfere with such expressive activity.").

for the Eastern District of Virginia commenced a hearing for a permanent injunction;²⁴ four days later, the court granted the injunction based on 42 U.S.C. § 1985(3) and the state law claims of trespass and public nuisance.²⁵ The district court held that the health clinics and their patients, as "women seeking abortion," constituted a subset of a gender-based class and, as such, were protected by the statute.²⁶ In addition, the court found that the purpose of Operation Rescue's actions was to deprive, either directly or indirectly, this class of the right to travel interstate for the purpose of obtaining abortion services.²⁷ Agreeing that "the activities of [the members of Operation Rescue] in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by the law,"²⁸ the United States Court of Appeals for the Fourth Circuit affirmed.²⁹ The Supreme Court granted certiorari³⁰ and, in an opinion written by Justice Scalia,³¹ reversed the lower courts' findings of liability under § 1985(3).³²

Based on the premise that members of a "class" must share some identifiable ties other than their status as victims of the conspirators' disfavor,³³

24. *National Org. for Women*, 726 F. Supp. at 1486.

25. *Id.* at 1496-97.

26. *Id.* at 1492.

27. *Id.* at 1493. It is well-established that "section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights its designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). "The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere." *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983). For this reason, the health clinics in *Bray* alleged that by infringing women's constitutional rights to interstate travel and abortion, Operation Rescue and its members deprived women of equal protection in violation of § 1985(3).

28. *National Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *rev'd in part & vacated in part*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

29. *Id.*

30. *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

31. Chief Justice Rehnquist and Justices White, Kennedy, and Thomas joined in Justice Scalia's opinion. *Bray*, 113 S. Ct. at 757; *see also infra* notes 33-45 and accompanying text. Justice Kennedy issued a concurring opinion. *Bray*, 113 S. Ct. at 768-69 (Kennedy, J., concurring); *see also infra* note 45. Justice Souter wrote a separate opinion concurring in part and dissenting in part. *Bray*, 113 S. Ct. at 769-79 (Souter, J., concurring in part and dissenting in part); *see also infra* note 45. Both Justice Stevens and Justice O'Connor issued dissenting opinions in which Justice Blackmun joined. *Bray*, 113 S. Ct. at 779-99 (Stevens, J., dissenting); *see also infra* notes 46-49 and accompanying text; *Bray*, 113 S. Ct. at 799-805 (O'Connor, J., dissenting); *see also infra* notes 50-53 and accompanying text.

32. *Bray*, 113 S. Ct. at 768.

33. *Id.* at 759. As previously explained by Justice Blackmun:

[T]he intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendant's actions; that is, it cannot be defined simply as the group of victims of the tortious action.

United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 850 (1983) (Blackmun, J., dissenting) (citations omitted); *see also Roe v. Abortion Abolition Soc'y*, 811 F.2d 931, 935 (5th Cir.), *cert.*

the *Bray* majority concluded that "women seeking abortions" do not qualify as a class for purposes of the statute.³⁴ The Court declined to answer the question, which has divided the circuit courts since *Griffin v. Breckenridge*,³⁵ of whether § 1985(3) is broad enough to encompass the gender-based class of "women."³⁶

Instead of addressing the gender-based class issue, the Court reversed the district court's decision on the ground that the "class-based invidiously discriminatory animus" necessary to satisfy the second element of a § 1985(3) claim was not present.³⁷ To establish a class-based animus in the *Bray* situation, the majority asserted that one of two propositions must be true: either "opposition to abortion can reasonably be presumed to reflect a sex-based intent, or . . . intent is irrelevant and a class-based animus can be

denied, 484 U.S. 848 (1987) ("The class prohibited by § 1985(3) is thus defined by the characteristics of those at whom the conspiracy is aimed, not by the beliefs of the conspirators.").

34. *Bray*, 113 S. Ct. at 759.

35. 403 U.S. 88 (1971).

36. *Bray*, 113 S. Ct. at 759. Compare *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 224 (6th Cir. 1991) ("[W]omen constitute a cognizable class under § 1985(3).") and *National Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990) (affirming district court ruling that "women seeking abortion" is a proper class for § 1985(3) purposes), *rev'd in part and vacated in part*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) and *New York Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1360-61 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (holding that impeding access to abortion clinics violates the rights of women to travel interstate) and *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) ("[Section] 1985(3) extends . . . to conspiracies to discriminate against persons based on sex . . .") and *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984) (finding liability under § 1983 and § 1985(3) for Commissioners' purposeful maintenance of pay disparities against the plaintiffs because they were women) and *Life Ins. Co. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) ("[W]omen purchasers of disability insurance are a sufficient class.") and *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978) (upholding district court finding that plaintiff alleged a conspiracy directed against her because of her race and sex) and *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243 (3d Cir. 1978) (holding that "[t]he fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideas of equality convince us that whatever the boundaries of the concept, an animus directed against women includes the elements of a 'class-based invidiously discriminatory' motivation"), *vacated on other grounds*, 442 U.S. 366 (1979) with *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989) (holding that, because the animus of the defendants' actions was directed at anyone who contributed to the abortion process, the designated class of "women of child-bearing age who seek medical attention from the MWMC" was "so under-inclusive as to mischaracterize the dispute") and *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931, 935-37 (5th Cir.) (holding that "those people who do not agree with the Society defendants' point of view" do not form a protected class under § 1985(3)), *cert. denied*, 484 U.S. 848 (1987). See generally Mary F. Leheny, Note, *A Question of Class: Does 42 U.S.C. Section 1985(3) Protect Women Who are Barred from Abortion Clinics*, 60 *FORDHAM L. REV.* 715 (1992) (assessing the history and interpretation of § 1985(3) regarding women seeking abortions); Romualdo P. Eclavea, Annotation, *Applicability of 42 U.S.C.S. § 1985(3) to Sex-Based Discrimination*, 46 *A.L.R. FED.* 342 (1980) (examining the case law of efforts to bring sex discrimination claims within the purview of § 1985(3)).

37. *Bray*, 113 S. Ct. at 762.

determined solely by effect.”³⁸ Rejecting the second proposition, the Court held that § 1985(3) requires an element of intent beyond a showing of disparate impact.³⁹ Citing *Maier v. Roe*⁴⁰ and *Harris v. McRae*,⁴¹ which established the constitutionality of government abortion-funding restrictions, the majority concluded that disfavoring abortion is not ipso facto sex discrimination.⁴² The Court then rejected the proposition that opposition to abortion can reasonably be presumed to reflect a sex-based discriminatory intent. The Court stated that “some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.”⁴³ However, because “there are common and respectable reasons for opposing [abortion], other than hatred of or condescension toward (or indeed any view at all concerning) women as a class,”⁴⁴ opposition to abortion cannot form the basis for an inference of discriminatory intent.⁴⁵

In his dissent, Justice Stevens criticized the Court for injecting a new and subjective element into the statute. He noted that “[t]he Court is apparently willing to presume discrimination only when opposition to the targeted activity is—in its eyes—wholly pretextual: that is, when it thinks that no rational person would oppose the activity, except as a means of

38. *Id.* at 760.

39. *Id.* (“‘Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.’” (quoting *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979))).

40. 432 U.S. 464 (1977); see also *infra* note 94.

41. 448 U.S. 297 (1980); see also *infra* note 95.

42. *Bray*, 113 S. Ct. at 760-61.

43. *Id.* at 760.

44. *Id.*

45. *Id.* Justice Kennedy joined fully in the holding and reasoning of the majority. *Id.* at 768 (Kennedy, J., concurring). In his separate concurrence, he added that in the event of a law enforcement emergency, in which state and local officials are incapable of maintaining law and order, the Attorney General of the United States, upon a request by the states under 42 U.S.C. § 10501 (1988), has the power to “put the full range of law enforcement resources at the disposal of the State.” *Id.* at 769 (Kennedy, J., concurring).

Similarly, Justice Souter concurred in the majority’s conclusion. *Id.* at 770 (Souter, J., concurring in part and dissenting in part). However, he argued that the district court’s opinion implied the conclusion that the health clinics had properly stated a claim under the second clause of § 1985(3), which provides relief against conspiracies “for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws,” 42 U.S.C. § 1985(3) (1988). *Bray*, 113 S. Ct. at 778-79 (Souter, J., concurring in part and dissenting in part). Because the application of this clause had not been explicitly argued before the Court and was not expressly relied upon by the lower courts, Justice Souter would have vacated the court of appeals’ decision and remanded for consideration of whether the acts of Operation Rescue are actionable under the prevention clause of § 1985(3). *Bray*, 113 S. Ct. at 779 (Souter, J., concurring in part and dissenting in part).

achieving a separate and distinct goal."⁴⁶ He argued that a "finding that to disfavor abortion is 'ipso facto' to discriminate . . . against women" is not required in the *Bray* situation.⁴⁷ Instead, he asserted that, whatever the validity of moral opposition to abortion, a sex-based intent can reasonably be presumed from the "lawless conspiracy [by Operation Rescue] employing force to prevent women from exercising their constitutional rights."⁴⁸ In his opinion, the class-based animus requirement of a § 1985(3) claim "is satisfied if the conspiracy is aimed at conduct that only [members of] the protected class have the capacity to perform."⁴⁹

In an argument similar to that of Justice Stevens, Justice O'Connor also concluded that the actions of Operation Rescue evinced a class-based, invidiously discriminatory animus.⁵⁰ She argued that, unlike the word "deny" used in the Fourteenth Amendment, "the word 'deprive' indicates an intent to prevent private actors from taking away what the State has seen fit to bestow."⁵¹ Section 1985(3) is therefore not to be construed in tandem with the Fourteenth Amendment, but as a complement to it, operating to extend its provisions to protect victims of private conspiracies.⁵² Justice O'Connor would have held that "*Griffin's* element of class-based discrimination is met whenever private conspirators target their actions at members of a protected class, by virtue of their class characteristics, and deprive them of their equal enjoyment of the rights accorded them under law."⁵³

Understanding the *Bray* decision requires an examination of the history of § 1985(3) litigation and the development of the law regarding disparate impact and inferences of gender discrimination. The Ku Klux Klan

46. *Bray*, 113 S. Ct. at 788 (Stevens, J., dissenting).

47. *Id.* at 787 (Stevens, J., dissenting).

48. *Id.* (Stevens, J., dissenting). Echoing this opinion, Justice O'Connor stated: [I]n assessing the motivation behind petitioners' actions, the sincerity of their opposition cannot surmount the manner in which they have chosen to express it It is undeniably petitioners' purpose to target a protected class, on account of their class characteristics, and to prevent them from the equal enjoyment of these personal and property rights under law. The element of class-based discrimination that *Griffin* read into § 1985(3) should require no further showing.

Id. at 802 (O'Connor, J., dissenting).

49. *Id.* (Stevens, J., dissenting). In refuting the majority's second proposition, Justice Stevens argued that the majority's reliance on *Geduldig v. Aiello*, 417 U.S. 484 (1974), *Maier v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), was misplaced. In his view, the concerns raised by a statutory claim under § 1985(3) and those raised by a constitutional challenge are very different and thus justify different results. *Bray*, 113 S. Ct. at 790-91 (Stevens, J., dissenting). Consequently, he would have applied less stringent standards under § 1985(3) and held that "classifications based on ability to become pregnant are necessarily discriminatory." *Id.* at 792 (Stevens, J., dissenting).

50. *Bray*, 113 S. Ct. at 800 (O'Connor, J., dissenting).

51. *Id.* at 803 (O'Connor, J., dissenting).

52. *Id.* (O'Connor, J., dissenting).

53. *Id.* at 804 (O'Connor, J., dissenting).

Act, as it now reads,⁵⁴ was enacted in 1871 and was intended to apply only to those tortious deprivations of rights "the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights."⁵⁵

Despite the goals of the Forty-Second Congress,⁵⁶ the Supreme Court's decisions in the decade following the enactment of the Ku Klux Klan Act indirectly but systematically eviscerated the Act and rendered it of little, if any, use to its intended beneficiaries.⁵⁷ For more than eighty years, the statute books containing this section languished on the shelves only to have the Court, in the 1951 case of *Collins v. Hardyman*,⁵⁸ revisit and recognize further limits on its possible use. Expressing constitutional concerns about federalism,⁵⁹ the *Collins* Court held that a viable conspiracy under

54. For a brief discussion of the legislative history leading up to the adoption of § 1985(3), see *infra* note 72.

55. CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871) (statement of Rep. Shellabarger).

56. The Ku Klux Klan Act was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Rev. Stat. 13 (1871). As described by Representative Shellabarger:

The whole design and scope of the second section of this bill was to do this: to provide for the punishment of any combination or conspiracy to deprive a citizen of the United States of such rights and immunities as he has by virtue of the laws of the United States and of the Constitution thereof.

CONG. GLOBE, 42d Cong., 1st Sess. 382 (1871).

57. In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court held that the Privileges and Immunities Clause of the Fourteenth Amendment protects only those rights that are derived from national, as opposed to state, citizenship. *Id.* at 78. By implication, the privileges and immunities language of § 1985(3) would be similarly limited. Following the *Slaughter-House Cases*, the Court reaffirmed this holding in *United States v. Cruikshank*, 92 U.S. 542 (1876). In that case, the Court addressed whether § 6 of the Enforcement Act of May 31, 1870, ch. 114, 16 Rev. Stat. 140 (1870), applied to a conspiracy to "injure, oppress, threaten and intimidate" two black men. The Court held that, because the duty to protect equality of rights is that of the states, "[t]he only obligation resting upon the United States is to see that the states do not deny the right." *Cruikshank*, 92 U.S. at 555. The culmination of the Court's persistent limiting of the language of § 1985(3) was the case of *United States v. Harris*, 106 U.S. 629 (1883). In *Harris*, the Court addressed the constitutionality of the criminal prong of § 2 of the Ku Klux Klan Act, ch. 22, 17 Rev. Stat. 13 (1871), which provided that those found guilty of a conspiracy to deprive another of equal protection would be punishable under the Act of April 9, 1866, ch. 31, 14 Rev. Stat. 27 (1866). The Court held that, because the Act could be interpreted to make a federal crime of any conspiracy by two or more persons to violate another's rights to equal protection under state law, the act was not warranted by the Fourteenth Amendment. *Harris*, 106 U.S. at 640. Thus, following *Harris*, a conspiracy under § 1985(3) would not only have to involve a violation of a narrow subset of rights arising from national citizenship, it also would have to be the result of state action that operated to deny citizens equal protection. See *id.* For a more detailed discussion of the enactment and judicial history of § 1985(3), see Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 541-46 (1985).

58. 341 U.S. 651 (1951).

59. In *Harris*, discussed *supra* note 57, the Supreme Court struck down the criminal counterpart to § 1985(3) as not warranted by any clause of the Fourteenth Amendment because it "is directed exclusively against the action of private persons, without reference to the laws of the

§ 1985(3) must include some state action or action under color of state law.⁶⁰ The Court explained that "an individual or group of individuals not in office cannot *deprive* anybody of constitutional rights, though they may invade or violate those rights."⁶¹ Consequently, purely private deprivations have no bearing on the equality of the law unless they in some way manipulate the law or its agencies in furtherance of the discriminators' own purposes.⁶²

Following *Collins*, § 1985(3) remained dormant for an additional twenty years before finally being revived in *Griffin v. Breckenridge*.⁶³ *Griffin* involved a suit by two black men whom a group of white men assaulted.⁶⁴ The two African Americans were passengers in a car driven by a white man in DeKalb, Mississippi.⁶⁵ Mistakenly believing that the driver was a civil rights worker, the defendants drove their truck into the plaintiffs' path and prevented them from passing.⁶⁶ They forced all three men out of the vehicle and severely beat them.⁶⁷

Recognizing that the constitutional problems envisioned by the *Collins* Court had not materialized,⁶⁸ the Court ruled that, properly construed,

State or their administration by her officers." *Harris*, 106 U.S. at 640. Similarly, the *Collins* Court argued that applying the civil remedies provision of § 1985(3) to purely private conspiracies would raise constitutional problems of "congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights." *Collins*, 341 U.S. at 659.

60. *Collins*, 341 U.S. at 661-62.

61. *Id.* at 661.

62. *Id.*; see also *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."); *Harris*, 106 U.S. at 643 ("A private person cannot make constitutions or laws, nor can he with authority construe them. . . . The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offence against the laws which protect the rights of persons."); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875) ("The [F]ourteenth [A]mendment . . . does not add any thing to the rights which one citizen has . . . against another."). But see *Collins*, 341 U.S. at 664 (Burton, J., dissenting) ("Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights. It seems to me that Congress has done just this in [§ 1985(3)].").

63. 403 U.S. 88 (1971).

64. *Id.* at 91-92.

65. *Id.* at 90.

66. *Id.*

67. *Id.* at 90-91.

68. *Id.* at 95-96 ("[I]t is clear, in the light of the evolution of decisional law in the years that have passed since [*Collins*] was decided, that many of the constitutional problems there perceived simply do not exist.").

§ 1985(3) encompasses wholly private conspiracies.⁶⁹ The Court identified four elements of a § 1985 cause of action: (1) a conspiracy (2) for the purpose of depriving, directly or indirectly, a person or class of persons of equal protection or equal privileges and immunities (3) in which some action is taken in furtherance of the conspiracy and (4) results in some injury.⁷⁰ However, the Court recognized that the statute was not meant to apply to "all tortious, conspiratorial interferences with the rights of others."⁷¹ To avoid creating an unconstitutionally broad general federal tort law, the Court interpreted the third requirement to mean that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."⁷² The question addressed by the *Bray* Court, then, was whether the actions of Operation Rescue manifested such an animus.

69. *Id.* at 96 ("Little reason remains, therefore, not to accord the words of the statute their apparent meaning. . . . On their face, the words of the statute fully encompass the conduct of private persons.").

70. *Id.* at 102-03.

71. *Id.* at 101.

72. *Id.* at 102. The original version of § 2 of the 1871 Act did not include the focus on animus that is implicit in the equal protection language of the adopted version. As originally introduced in the House of Representatives, § 2 provided:

If two or more persons shall, within the limits of any State, band, or conspire, or combine together to do any act in violation of the rights, privileges, or immunities of another person, which being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subordination of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable, &c., and the crime shall be punishable as such in the courts of the United States.

CONG. GLOBE, 42d Cong., 1st Sess. app. 68-69 (1871).

In the debates leading up to the enactment of the Ku Klux Klan Act, many members of Congress expressed concerns that § 2 was too broad and constituted an unconstitutional invasion into areas traditionally governed by state law. To alleviate these concerns, Congress amended the section to include the equal protection language found in the adopted version. The effect of this amendment was to limit the statute's application to "those conspiracies which threatened the equal protection of certain classes of individuals," *id.*, and to give rise to the requirement, established in *Griffin*, that the conspiracy be motivated by a "class-based invidiously discriminatory animus." See Gormley, *supra* note 57, at 537-39.

In *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), the Court elaborated on this standard and added a caveat to the application of § 1985(3) to private conspiracies. Under the *Carpenters* Court's formulation, a conspiracy in violation of § 1985(3), in addition to manifesting a class-based invidiously discriminatory animus, must also be "aimed at interfering with rights constitutionally protected against private, as well as official, encroachment." *Id.* at 833. The *Bray* Court held that the health clinics did not satisfy this requirement. *Bray*, 113 S. Ct. at 764. An analysis of that portion of the Court's decision is beyond the scope of this Note.

In addition to understanding the evolution of § 1985(3), full comprehension of *Bray's* significance also requires an examination of the Court's historical approach to gender discrimination. The Fourteenth Amendment guarantees individuals equal treatment by the state.⁷³ Although the Constitution allows states to classify persons and treat them differently in furtherance of state interests,⁷⁴ it limits the extent to which these classifications may be based upon immutable characteristics such as race,⁷⁵ sex,⁷⁶ and alienage.⁷⁷ Moreover, once a state enacts apparently neutral laws, it must administer and enforce them equally.⁷⁸ In general, when it can be shown that a particular statute adversely affects a protected class, a court undertakes a two-fold inquiry to determine if the statutory classification is indeed class-based. The court first examines whether an impermissible classification appears on the face of the statute; if not, the court determines whether the adverse effects reflect invidious discrimination.⁷⁹ In assessing the second factor, the Court has recognized that a law inevitably affecting an identifiable class in an adverse manner may create an inference that those

73. Section 1 of the Fourteenth Amendment prohibits each state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONN. AMEND. XIV, § 2. As interpreted by the Court, this amendment affords no relief against private discrimination not involving state action. *See, e.g., Carpenters*, 463 U.S. at 831; *United States v. Guest*, 383 U.S. 745, 755 (1966); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *United States v. Harris*, 106 U.S. 629, 643 (1882); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875).

74. *See, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 271-72 (1979); *Mathews v. Lucas*, 427 U.S. 495, 503-04 (1976); *United States v. Maryland Sav. Share Ins. Corp.*, 400 U.S. 4, 6 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). However, it should be noted that the rights of states to classify persons and treat them differently is not unlimited. At the lowest level of scrutiny, a showing that "there are plausible reasons for Congress' action" is enough to satisfy the Constitution. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

75. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 305 (1978) (holding that "racial and ethnic distinctions of any sort are inherently suspect" and that "in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that the use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interests") (internal quotations omitted).

76. *See, e.g., Craig v. Boren*, 429 U.S. 190, 204 (1976) (requiring that a "gender-based difference be substantially related to achievement of the statutory objective").

77. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977):

[C]lassifications by a State that are based on alienage are inherently suspect and subject to close judicial scrutiny. In undertaking this scrutiny, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.

Id. at 7 (internal quotations and citations omitted).

78. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

79. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979); *Maher v. Roe*, 432 U.S. 464, 470 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

effects were intended.⁸⁰ However, in deference to the well-settled rule that "the Fourteenth Amendment guarantees equal laws, not equal results,"⁸¹ the Court has often refused to infer an invidious purpose when a rational explanation for the classification can be advanced.⁸²

In applying this equal protection analysis to gender discrimination, the Court has only recently recognized gender as a protected class.⁸³ Prior to *Reed v. Reed*,⁸⁴ classifications based on gender were considered valid even when unrelated to the individual's capacity to participate in a particular activity.⁸⁵ As Justice Brennan stated, "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."⁸⁶ After vacillating among standards for a five-year period follow-

80. *Feeney*, 442 U.S. at 279 n.25 ("Certainly, when [there are] adverse consequences of a law upon an identifiable group . . . [,] a strong inference that the adverse effects were desired can reasonably be drawn.").

81. *Id.* at 273; see also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in racially disproportionate impact."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act . . . is unconstitutional solely because it has a racially disproportionate impact.").

82. See, e.g., *Feeney*, 442 U.S. at 279; *Village of Arlington Heights*, 429 U.S. at 270; *Washington*, 426 U.S. at 246. For a criticism of the purpose test, see Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Professor Lawrence argues that to accomplish the goal of eradicating racial discrimination, the law must take into account unconscious racism. As an alternative to the purpose test, he proposes a "cultural meaning" test that would "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance." *Id.* at 324.

83. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); see also *Craig v. Boren*, 429 U.S. 190, 197-99 (1976); *Weinberger v. Weisenfeld*, 420 U.S. 636, 642-43 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

84. 404 U.S. 71 (1971).

85. This is not to say that sex-based classifications were not subject to constitutional scrutiny. Prior to *Reed*, gender classifications were accorded scrutiny under the rational basis test, but were routinely found to be valid. A good example of the traditional obstacles faced by women when trying to seek redress for unequal treatment is found in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), in which the Supreme Court upheld a state court decision denying a woman a license to practice law. In his well-known concurring opinion, Justice Bradley stated:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Id. at 141 (Bradley, J., concurring).

86. *Frontiero*, 411 U.S. at 684.

ing *Reed*, the Court appears to have settled on according gender classifications intermediate scrutiny. Thus, to pass constitutional muster, a legislative scheme that differentiates on the basis of gender must bear a substantial relationship to an important governmental objective.⁸⁷ Under laws that unequally burden women as a class, then, a showing of unequal treatment without the furtherance of an important state interest may reasonably form the basis for a finding of invidious intent.⁸⁸

In *Geduldig v. Aiello*⁸⁹ and *General Electric Co. v. Gilbert*,⁹⁰ a legal distinction began to emerge on issues—such as pregnancy and abortion—that affect women uniquely. In *Geduldig*, the Court upheld as constitutional a California statute that denied disability compensation to women for pregnancy-related employment disabilities.⁹¹ On virtually indistinguishable facts, the Court in *General Electric* held that the exclusion of pregnancy-related benefits from an employer-provided disability plan did not violate Title VII of the 1964 Civil Rights Act.⁹² In both cases, the Court's holding rested upon the theory that women were not being unequally deprived of rights or benefits that others enjoyed, but rather were being denied additional benefits for additional risks.⁹³

87. See *Craig*, 429 U.S. at 204 (invoking a standard of substantial relation to the achievement of the statutory objective); *Weinberger*, 420 U.S. at 651 (implying that a law must be rationally related to the purpose of the legislation); *Frontiero*, 411 U.S. at 682 ("[C]lassifications based upon sex . . . are inherently suspect and must therefore be subjected to close judicial scrutiny."); *Reed*, 404 U.S. at 76-77 (requiring a rational relationship to a state objective); see also *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979) (requiring a "close and substantial relationship to important governmental objectives").

88. See, e.g., *Frontiero*, 411 U.S. at 690 (holding that a statutory scheme that presumptively denies dependent status for husbands of female military personnel could not be justified based upon a purpose of "administrative convenience"); *Reed*, 404 U.S. at 77 (holding that a purpose to eliminate one point of controversy between persons equally entitled to administer an estate is insufficient to justify establishment of absolute preferences on the basis of sex). But see *Feeney*, 442 U.S. at 279-80 (holding that a purpose of assisting veterans overrides an inference of discriminatory purpose for a veterans preference statute that unequally burdens women).

89. 417 U.S. 484 (1974).

90. 429 U.S. 125 (1976).

91. *Geduldig*, 417 U.S. at 497.

92. *General Electric*, 429 U.S. at 145-46.

93. In *Geduldig*, the State of California asserted an interest in providing the broadest possible disability benefit program while at the same time maintaining an affordable rate structure. It argued that inclusion of pregnancy benefits would render it unable to maintain the program on a wholly employee-funded basis and would force it to raise its maximum annual contribution rate. *Geduldig*, 417 U.S. at 493-94. In upholding the statute, the Court ruled:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

This distinction was later sustained in the abortion context in *Maier v. Roe*⁹⁴ and *Harris v. McRae*.⁹⁵

In contrast to discrimination through state action, private discrimination is not a violation of the Fourteenth Amendment.⁹⁶ For individual, private acts of discrimination to be actionable, they must fall within a statutory prohibition (like § 1985(3)) or violate constitutional rights protected from private as well as state action.⁹⁷ Under Title VII of the Civil Rights Act of 1964, for example, a classification that results in disparate impact, if not shown to be rationally justified on non-discriminatory grounds, gives rise to a presumption of invidious intent.⁹⁸

Id. at 497 n.20; accord *General Electric*, 429 U.S. at 145-46.

Notably, Congress has superseded the reasoning of both *Geduldig* and *General Electric* by statute. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983). In 1978, Congress responded to these decisions by amending Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy." Pregnancy Discrimination Act, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)). In pertinent part, the Act reads: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.*

94. 432 U.S. 464 (1977). In *Maier*, the plaintiffs challenged a Connecticut regulation that funded childbirth but denied funding for abortions except in cases of medical necessity. *Id.* at 466-67. The Court held that the state, merely by encouraging an alternative to abortion, did not place a burden on the women's right to abortion. *Id.* at 474. Hence, the regulation was constitutional based upon its rational relationship to the state's constitutionally permissible purpose of encouraging childbirth. *Id.* at 478-79.

95. 448 U.S. 297 (1980). The plaintiffs in *Harris* argued that, even though the so-called Hyde Amendment, 93 Stat. 662 (1979), to Subchapter XIX of the Social Security Act, 42 U.S.C. § 1396a-u (1988 & Supp. III 1992), denies federal reimbursement for state-funded abortions, states participating in the Medicaid program are required to fund medically necessary abortions. *Harris*, 448 U.S. at 301. Citing *Maier*'s recognition of "the basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," *Maier*, 432 U.S. at 475-76, the Court found that "[t]he Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather . . . encourages alternative activity deemed in the public interest." *Harris*, 448 U.S. at 315.

96. See *supra* note 73.

97. See, e.g., *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 830 (1983) (holding that a conspiracy to violate First Amendment rights is not within § 1985(3) in the absence of state action); *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (holding that the rights created by the Thirteenth Amendment and the right to interstate travel are protected from private as well as official infringement). For an example of rights protected by statute, see Civil Rights Act of 1964, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e (1998)).

98. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). In *Griggs*, a group of African-American employees sued Duke Power Company, alleging that the company's practice of requiring potential employees to pass literacy tests disproportionately excluded African Americans from the employment pool and therefore discriminated against them in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e-2 (1988). *Griggs*, 401 U.S. at 425-26. Holding that the literacy tests constituted a violation of Title VII, the Court stated:

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Against this backdrop of cases, the *Bray* Court addressed whether a conspiracy by private individuals to prevent others from gaining access to abortion clinics constitutes an invidious purpose.⁹⁹ To determine the existence of a "class-based invidiously discriminatory animus," two questions must be answered: first, were the conspirators' motivations class-based,¹⁰⁰ and second, were they invidiously discriminatory?

Despite the ostensible clarity of this distinction, the majority did not separate the question of class-based targeting from invidious class-based discrimination. Citing *Geduldig v. Aiello*,¹⁰¹ Justice Scalia found that, although only women have the capacity to become pregnant and have abortions, classifications drawn along those lines are not necessarily sex-based.¹⁰² The *Bray* Court seemingly argued that a classification is only class-based if it is drawn along class lines *with* the intent to disadvantage that class. In contrast, Justice Stevens, also citing *Geduldig*, asserted that intent or motivation is irrelevant to the determination of whether a classification is class-based.¹⁰³ In his view, because the possibility of pregnancy is an inherited characteristic that constitutes the primary difference between men and women,¹⁰⁴ any classification of persons based on this characteristic is necessarily gender-based.¹⁰⁵

That Justice Stevens' interpretation of *Geduldig* adheres more closely to precedent is evident from a complete reading of the quote upon which the majority relied: "While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification *like those considered in Reed and Frontiero*."¹⁰⁶ A sex-based classification is therefore a necessary but not sufficient ele-

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a class] cannot be shown to be related to job performance, the practice is prohibited.

Id. at 431.

99. *Bray*, 113 S. Ct. at 759-62.

100. The question of whether intent is class-based is markedly different from the issue of whether a proper class has been identified. The latter question is beyond the scope of this Note. For a discussion of that issue in the abortion context, see Leheny, *supra* note 36, at 715.

101. 417 U.S. 484 (1974).

102. *Bray*, 113 S. Ct. at 760 ("While it is true . . . that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." (quoting *Geduldig*, 417 U.S. at 496 n.20)).

103. *Id.* at 787 n.20, 789 (Stevens, J., dissenting).

104. While not all women can become pregnant, the ability to become pregnant is a unique characteristic of the female sex. Consequently, all those who potentially could become pregnant are necessarily women.

105. *Bray*, 113 S. Ct. at 787 n.20 (Stevens, J., dissenting). Similarly, Justice O'Connor would find that the conspirators' motivation is class-based when it is "directly related to characteristics unique to that class." *Id.* at 802 (O'Connor, J., dissenting).

106. *Geduldig*, 417 U.S. at 496 n.20 (emphasis added).

ment of invidious discrimination. In this light, *Geduldig* does not stand for the proposition that pregnancy-based classifications are not all sex-based; instead, it stands for the concept that only those pregnancy-based classifications that have as their purpose the imposition of additional burdens on women are invidiously discriminatory.¹⁰⁷

After establishing that the motivation of a conspiracy was class-based, the focus of a court's inquiry must shift to whether the conspirators' actions evinced an invidious purpose.¹⁰⁸ Because § 1985(3) requires an express showing of intent,¹⁰⁹ the majority held that, to find a class-based invidiously discriminatory animus in the *Bray* case, the Court would have to find that opposition to abortion reasonably can be presumed to reflect a sex-based intent.¹¹⁰ Although Justice Stevens disputed this express intent requirement,¹¹¹ he otherwise agreed that the health clinics were required to prove conduct from which a reasonable presumption of invidious purpose could be drawn.¹¹² Whether the conduct of Operation Rescue and its members should give rise to a presumption of discriminatory purpose constituted the key point of disagreement within the Court and formed the basis for the majority's creation of its "irrational object of disfavor" test.

As an example of the activities that are "such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed," the majority offered that a tax on wearing yarmulkes clearly would be an impermissible, religious-based

107. See *Bray*, 113 S. Ct. at 789 (Stevens, J., dissenting).

108. The term "invidious" in the context of a Fourteenth Amendment claim means "arbitrary, irrational, and not reasonably related to a legitimate purpose." BLACK'S LAW DICTIONARY 826 (6th ed. 1990).

109. In *Feeney*, the Court ruled that § 1985(3) requires an express showing of discriminatory intent; disparate impact, without more, is insufficient to support a cause of action under the statute. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). As stated by the Court: "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse impacts upon an identifiable group." *Id.* (citations omitted).

110. *Bray*, 113 S. Ct. at 760. The majority dispensed with the inference based on its "irrational object of disfavor" test and further stated that, with the test satisfied, the Court would have to find that to disfavor abortion is ipso facto to invidiously discriminate against women. *Id.*

111. Justice Stevens responded to the majority's position by arguing that the class animus asserted by the health clinics only requires a reasonable presumption of sex-based intent. *Id.* at 787 (Stevens, J., dissenting). Justice Stevens posited that "there is no reason to insist that a statutory claim under § 1985(3) must satisfy the restrictions we impose on constitutional claims under the Fourteenth Amendment. A congressional statute may offer relief from discriminatory effects even if the Fourteenth Amendment prevents only discriminatory intent." *Id.* at 789 (Stevens, J., dissenting). The majority responded that, with § 1985(3), Congress has not done so. *Id.* at 760 n.4.

112. *Id.* at 787 (Stevens, J., dissenting).

tax on Jews.¹¹³ Unlike that classification, however, the majority held that abortion, the subject of what it considered a legitimate moral debate, is not such an irrational object of disfavor that intent to disadvantage women can be inferred.¹¹⁴ The majority's explanation why an act to disfavor the wearing of yarmulkes, an activity engaged in solely by Jews, is a religious-based classification, while violent interference with access to abortion, an activity engaged in solely by women, is not a sex-based classification, is unpersuasive. As Justice O'Connor noted, the majority's argument that Operation Rescue's actions affect only those women who seek an abortion and therefore result in the relevant class being defined as "women seeking abortions," an unrecognizable class comprised solely of the conspiracy's victims, is facetious.¹¹⁵ First, violations of the rights of those women who seek an abortion does not just affect those individuals. Those women arguably serve as mere examples to be used as pawns in a violent campaign to deprive *all* women of their rights. Second, just as all women do not seek or even approve of abortions, not all Jews wear yarmulkes.¹¹⁶ The Court's suggestion that disfavoring yarmulkes gives rise to an anti-Semitic animus while disfavoring of abortions does not give rise to an anti-female animus is logical only if one accepts the Court's rational object of disfavor test.¹¹⁷

The majority effectively stated that, for a presumption of discriminatory intent to arise, the targeted activity must be a mere pretext designed to disguise hatred of or condescension toward women, even if deprivation of the activity would result in disparate impact.¹¹⁸ If the defendants can advance a reason for disfavoring the activity other than ill will toward women, they will defeat the presumption and no invidious purpose will be recognized.¹¹⁹

The problems inherent in *Bray*'s irrational object of disfavor standard become readily apparent upon an examination of this test in light of the Court's precedents and the test's possible scope. First, the requirement implicit in the majority opinion—that the motivation of the conspirators' actions must be based on dislike of or condescension toward women—extends beyond the traditional threshold test for gender discrimination. As Justice Stevens pointed out, the Court has long held that ill will is not a

113. *Id.* at 760.

114. *Id.*

115. *See id.* at 801 (O'Connor, J., dissenting).

116. *Cf.* New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1360 (2d Cir. 1989) ("It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them.").

117. *See Bray*, 113 S. Ct. at 788-89 (Stevens, J., dissenting).

118. *See id.* at 787-89 (Stevens, J., dissenting).

119. *See id.* at 760 ("[T]here are common and respectable reasons for opposing [abortion], other than hatred of or condescension toward . . . women . . ." (emphasis added)).

requirement for invidious intent; any alternative that unequally deprives women of rights because they are women is discriminatory, regardless of the actor's subjective view toward women.¹²⁰ Since only women can have abortions, it seems nonsensical to argue that Operation Rescue does not select its targets because they are women. Moreover, even under the majority's slightly higher standard, the Court offered no response to Justice Steven's assertion in dissent that, at a minimum, Operation Rescue's actions manifested the invidious and condescending belief that women are not capable of deciding for themselves whether to terminate their pregnancies.¹²¹

The second and most threatening problem with the *Bray* decision is its subjectivity. In *General Electric*,¹²² the Court ruled that a distinction which is not sex-related on its face may still violate the Fourteenth Amendment if it is a mere pretext for invidious gender discrimination.¹²³ However, in that case, as in *Geduldig*,¹²⁴ the Court ruled that the differentiations at issue did not amount to sex discrimination.¹²⁵ As discussed above, both cases involved the permissibility of denials of insurance benefits for pregnancy-related disabilities.¹²⁶ Pregnancy, in this sense, was not a basis for placing additional burdens on women. Instead, the Court treated it purely as a condition comparable to any other disease or disability and thus concluded that pregnant women were merely being denied additional benefits for additional risks.¹²⁷ Because the state had legitimate and rationally justifiable reasons for excluding pregnancy from its risk pool and because the

120. See *id.* at 787 (Stevens, J., dissenting). While ill will or condescension toward women are traditional examples of invidious intent, they are not required. *Id.* (Stevens, J., dissenting). A showing that the actor intentionally disadvantaged a particular class on account of its class characteristics without a justifiable reason is sufficient. Cf. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies . . . that the [discriminator] . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) ("[B]y according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience," the statutory scheme invidiously discriminated on the basis of sex. (emphasis added)).

121. *Bray*, 113 S. Ct. at 788 (Stevens, J., dissenting).

122. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

123. *Id.* at 136.

124. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

125. *General Electric*, 429 U.S. at 137-38; *Geduldig*, 417 U.S. at 496-97.

126. See *supra* notes 89-93 and accompanying text.

127. *General Electric*, 429 U.S. at 136. In explaining this decision, the Court stated:

[W]e have no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability.

exclusion was not shown to be a disguise for impermissible purposes, the Court presumed no discriminatory intent.¹²⁸

By failing to recognize the distinction between *Geduldig* and *General Electric* and cases such as *Reed* and *Frontiero*, in which the classifications resulted in the imposition of a burden based on gender, the majority in *Bray* misapplied the pretext argument. One reason why the logic of *Geduldig* and *General Electric* does not apply in the *Bray* situation is that the actions taken by Operation Rescue and its members were not gender-neutral; direct deprivation of the right to abortion, unlike indirect discouragement of abortion by denial of insurance benefits, places a direct burden on women that men do not share.¹²⁹ The classification is therefore sex-based on its face, and the pretext question would not be reached under the *Geduldig/General Electric* test.

More importantly, the Court has historically limited the grounds recognized as "rational" justifications for particular constitutional or statutory classifications to economic rationales or to showings that the characteristic forming the basis of the classification bears some empirical relationship to the ability to perform the activity in question.¹³⁰ In the *Bray* decision, however, even granting that opposition to abortion may be an acceptable social view, the Court made a purely subjective, moral determination of what constitutes a "rational object of disfavor" sufficient to defeat an argument of pretext.

In responding to the majority, Justice Stevens recognized the subjective nature of this standard and the problems such a standard creates.¹³¹ After all, opposition to desegregation and to African-American and women's suffrage was once considered rational.¹³² Under the majority's test, what is a rational object of disfavor may change at any time based solely

128. *Id.* at 135-36; *Geduldig*, 417 U.S. at 496-97.

129. *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973).

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Id.

130. *See, e.g.,* *Maier v. Roe*, 432 U.S. 464, 478-80 (1977) (indicating that the economic justification of subsidizing costs incident to childbirth is a rational means of encouraging childbirth); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (noting that the failure of an employer to show a manifest relationship between a literacy test and job performance will result in a finding of discrimination by the employer).

131. *Bray*, 113 S. Ct. at 788 (Stevens, J., dissenting).

132. *Id.* (Stevens, J., dissenting); *see also* cases cited *supra* notes 85-86 (rationalizing gender distinctions).

upon the popular views of society or the ideological make-up of the Court. In the civil rights arena, such a standard renders the law unpredictable and relative and threatens the very concept embodied in our Constitution that there is a set of objective legal principles and fundamental rights with which all other laws must be consistent.

A third problem with the majority's reasoning in *Bray* is that it does not differentiate between the per se opposition to abortion and the active and physical deprivation of access to abortion. The *Bray* Court stated that the means by which Operation Rescue sought to express its views were irrelevant to the determination of discriminatory intent.¹³³ Both Justice Stevens and Justice O'Connor disagreed.¹³⁴ According to Justice O'Connor, "[T]he deliberate decision to isolate members of a vulnerable group and physically prevent them from conducting a legitimate activity cannot be irrelevant in assessing motivation."¹³⁵ In spite of the "rationality" of the object of disfavor, she opined that it is not "rational" to employ violent and illegal means to bypass the legal system and force one's views on others.¹³⁶

The relevant language here is that the intent must be to *deprive* another of equal rights. An invidious belief that is not acted upon does not fall within § 1985(3) because it does not result in a purposeful deprivation of another's rights. On the other hand, a conspiracy that targets its victims along class lines *and acts to prevent that class from exercising its rights* evinces an intent to deprive of equal protection.

Although the right to abortion itself was not at issue in *Bray*, the decision's potential effects on that right are great. The most recent statement of the Court's position on abortion rights is found in *Planned Parenthood v. Casey*.¹³⁷ At issue in that case were five key provisions of a Pennsylvania law designed to discourage abortions by making them more difficult to obtain.¹³⁸ A majority of the Court reaffirmed the central tenet of *Roe v. Wade*¹³⁹ by holding that states may not prohibit abortions before fetal via-

133. *Bray*, 113 S. Ct. at 762.

134. *Id.* at 787 (Stevens, J., dissenting); *id.* at 802 (O'Connor, J., dissenting).

135. *Id.* at 802 (O'Connor, J., dissenting); *cf.* *Maier v. Roe*, 432 U.S. 464, 475-76 (1977) (noting the "basic difference" in the constitutional equal protection analysis between "direct . . . interference with a protected activity" and "encouragement of an alternative activity").

136. *Bray*, 113 S. Ct. at 802 (O'Connor, J., dissenting).

137. 112 S. Ct. 2791 (1992).

138. *Id.* at 2803. The sections involved were 18 PA. CONS. STAT. § 3205 (1990), which provides for informed consent and mandatory 24-hour waiting periods; § 3206, which requires parental consent for minors; § 3209, which required a married woman to obtain the consent of her husband; § 3203, which exempts compliance upon a showing of medical emergency; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on abortion facilities. *Casey*, 112 S. Ct. at 2803.

139. 410 U.S. 113 (1973).

bility.¹⁴⁰ A plurality of the Court, which included Justices O'Connor, Kennedy and Souter, further determined that the appropriate standard to apply when testing the validity of state abortion laws is that of undue burden.¹⁴¹ Under this standard, a state statute is invalid if its "purpose and effect is to place substantial obstacles in the path of women seeking an abortion before the fetus obtains viability."¹⁴² Finding that, for the most part, the Pennsylvania law did not unduly burden women seeking abortions, the Court upheld all but one of its key provisions.¹⁴³

As a result of the *Bray* decision, the rights reaffirmed in *Casey* may become rights in name only: although states cannot place undue burdens on a woman's right to abortion, women have no effective redress when large, violent mobs do the same.¹⁴⁴ Arguably, this result is contrary to the

140. *Casey*, 112 S. Ct. at 2804.

141. *Id.* at 2820-21.

142. *Id.* at 2821.

143. *Id.* at 2831 (holding unconstitutional requirement under 19 PA. CONS. STAT. § 3209 that married women obtain their husbands' consent before receiving an abortion).

144. *Cf. TRIBE*, *supra* note 2, at 250. Offering predictions about the future of the abortion debate, Tribe analyzed the potential impact of the then-undecided *Bray* case in this way:

[U]nless the 'undue burden' test is applied with sensitivity to the circumstances of actual women in the real world, many burdens that from an Olympian judicial perspective might appear to be molehills are in fact massive obstacles to choice. . . . If *Casey* concerned a woman's legal right to choose, *Bray* . . . addressed the street-level question of a woman's practical ability to get through the clinic's door.

Id. (internal quotations omitted).

It is significant to note, however, that the health clinics and their supporters have declined to yield to the raging hordes of protestors ensconced outside their buildings. Soon after the *Bray* decision, bills were introduced in both houses of Congress that, if they become law, will establish a federal cause of action and make it a federal crime to

(1) by force or threat of force or by physical obstruction, intentionally injure[], intimidate[] or interfere[] with or attempt[] to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons, from—

(A) obtaining abortion services; or

(B) lawfully aiding another person to obtain abortion services; or

(2) intentionally damage[] or destroy[] the property of a medical facility or in which a medical facility is located, or attempt[] to do so, because such facility provides abortion services.

S. 636, 103d Cong., 1st Sess. § 3(b) (1993). The Senate version was passed on November 12, 1993. The House version has yet to be voted upon. *See* S. 636 & H.R. 796, available in WESTLAW, BC database.

Additionally, on January 24, 1994, in *National Organization for Women, Inc. v. Scheidler*, No. 92-780, 1994 WL 13716 (U.S. Jan. 24, 1994), the United States Supreme Court ruled unanimously that Operation Rescue and similar organizations may be sued under § 1962(c) of the Racketeer Influenced & Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970 (OCCA), 18 U.S.C. §§ 1961-68 (1988 & Supp. IV 1992). *Scheidler*, 1994 WL 13716 at *7. Under that section, the health clinics may be awarded injunctive relief, treble damages, costs, and attorney fees upon proof that the protestors conducted their "enterprise" through a pattern of "racketeering activity," such as "any act or threat involving murder, kidnapping, . . .

Forty-Second Congress's intent to prevent mob violence from accomplishing the same discriminatory results that states are forbidden to pursue. In the debates leading up to the enactment of § 1985(3), Representative Lowe expressed this concern:

What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a state has no law upon its statute-book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?¹⁴⁵

Extending the majority's holding beyond the abortion debate, the weakness of the Court's logic appears from its own analogy. The Court held that opposition to an activity engaged in only by members of one class does not create a presumption of a discriminatory animus toward that class.¹⁴⁶ In defending that position, the majority posited that—under the dissenters' view—if the law were to require rapists to be released from prison upon their agreement to enter counseling, those who regarded rape as an abomination and thus blockaded those clinics would be guilty of an invidiously discriminatory anti-male animus.¹⁴⁷ When one analyzes the parallels of this analogy to the abortion arena, the majority's argument is unpersuasive. First, a sex-based classification must be distinguished from sex-based discriminatory intent.¹⁴⁸ Making classifications along class lines is clearly permissible when done for a proper purpose.¹⁴⁹ Consequently, to say that the rape-opposition group would single out men as a class would not necessarily implicate the statute.¹⁵⁰ Second, the purpose of the activity must be to deprive the class of a protected right because of their class characteristics.¹⁵¹ In the anti-rape group analogy, the "right" to psychological counseling is not one protected by the Constitution in the same way as the right to abortion. Furthermore, these men would be deprived of access to counseling because of the activity in which they engaged, not because they were men per se.

arson, . . . extortion, . . . obstruction of State or local law enforcement[,] . . . [or] interference with commerce." *Id.* at *3, *7 n.4.

145. CONG. GLOBE, 42d Cong., 1st Sess. 375 (1871) (remarks of Rep. Lowe).

146. *Bray*, 113 S. Ct. at 760-61.

147. *Id.* at 761 n.4.

148. *See id.* at 787 n.20 (Stevens, J., dissenting); *see supra* notes 101-07 and accompanying text.

149. *See supra* notes 74, 87 and accompanying text.

150. It is also important to note that, while *only* women can become pregnant and seek abortions, the class of rapists is not necessarily limited to men.

151. *See supra* note 33 and accompanying text.

In the abortion context, all women, regardless of whether they choose to exercise it, have the right to terminate their pregnancies.¹⁵² The effects of physical impediments that deny clinic access to those who seek it are not limited to those victims. The women denied access to an abortion are examples used by Operation Rescue to deter all women from seeking to exercise their rights and, ultimately, to accomplish its goal of depriving all women of that right.¹⁵³ In the majority's analogy, however, it is difficult to imagine that any court would hold that all men have a right to commit rape. Unlike denying women access to abortion, denying men who have raped access to counseling infringes the rights only of those men who commit rape; assuming that those denying counseling to rapists are not using the men denied as "examples" to deter *all* men from counseling, such activity does not threaten the rights of men. Consequently, the majority's implication that to despise and violate the rights of someone who has committed a particular act does not give rise to an action under § 1985(3), while valid, does not address the situation in *Bray*.¹⁵⁴

A truly parallel situation—one to which the rape counseling analogy would apply—would exist if the state were to mandate post-abortion psychological counseling. To blockade those counseling clinics, unlike blockading abortion clinics, would not place burdens on the protected right of abortion, and therefore would not implicate a civil rights question.

In its use of the irrational object of disfavor test, the Court indicated that a class-based deprivation of rights will not give rise to an inference of discriminatory purpose if the deprivation was based on a rational object of disfavor. On the other hand, a class-based deprivation of rights will give rise to such an inference if the deprivation is secondary to the conspirators' real purpose of expressing opposition to or oppressing that class.¹⁵⁵ Because abortion is a unique right available only to women, however, depriving women of that right necessarily has the effect of disadvantaging and oppressing that class.¹⁵⁶ The majority does not adequately justify why these two situations should be treated as analytically different even though the results are the same. In both, an identifiable, protected class of persons is deprived of a fundamental right by illegal and violent means, and its

152. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992). This right is not unlimited, however. Under *Roe*, as reaffirmed by *Casey*, the right is absolute during the first trimester of pregnancy, but may be more strictly curtailed during the later stages. See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

153. Cf. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989) ("[A]ll defendants share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization."), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part & vacated in part*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

154. *Bray*, 113 S. Ct. at 761 n.4.

155. *Id.* at 760.

156. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807-08 (1992); see also *supra* note 129.

members are targeted as victims because of their membership in a particular class.

In attempting to differentiate between these two situations on the ground that, in one, opposition to the fundamental right is rational, the majority has overstepped the bounds of its role. The Court in *Bray* inappropriately uses the same words as those found in precedents that deemed classifications rational when they were economically justified or when the characteristic singled out had a true bearing on the ability to perform a particular task.¹⁵⁷ By misapplying those precedents in *Bray*, the Court has established that when, in its purely subjective wisdom, it determines that opposing an activity of a particular class is socially acceptable—that is, when the activity is “not an irrational object of disfavor”—there will be no presumption of discrimination.¹⁵⁸ Such a precedent has the potential to form the basis for infinite varieties of oppression, so long as they are hidden behind well-crafted “rational” explanations.¹⁵⁹ To say the least, the standard used to define discriminatory intent in *Bray* is relative and purely subjective. At its worst, it is a dangerous weapon that those with invidious prejudices may use to oppress those whom they disfavor.

A better approach would be to recognize the synergistic relationship of the class characteristics and the nature of the right being infringed. Only when the purpose of the conspiracy is to single out a protected class of individuals because of their class characteristics and to deprive them of a constitutional right should the requisite class-based animus be found.¹⁶⁰ Such a standard would be consistent with the language of § 1985(3) and would clearly fall short of creating a general federal tort law. Moreover, the plaintiff's class would be defined along the lines of immutable and identifiable characteristics, not, as the majority fears, as the victims of the conspiracy's activities. Under such a standard, the singling out of women because of a characteristic that distinguishes them as women—the ability to become pregnant—with the intent to deprive them of their fundamental right to abortion would be actionable. Blockading men's access to post-release counseling to eradicate rape clearly would not.

157. See *supra* notes 89-93, 98 and accompanying text.

158. *Bray*, 113 S. Ct. at 760.

159. *Id.* at 788-89 (Stevens, J., dissenting). See generally Robert Nelson, Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334 (1986) (arguing that courts should be able to infer discrimination from disparate impact).

160. Cf. *Bray*, 113 S. Ct. at 804 (O'Connor, J., dissenting). According to Justice O'Connor, “*Griffin's* element of class-based discrimination is met whenever private conspirators target their actions at members of a protected class, by virtue of their class characteristics, and deprive them of their equal enjoyment of the rights accorded them under law.” *Id.* (O'Connor, J., dissenting).

In conclusion, the majority in *Bray* stepped beyond its traditional test of rational justifications for behavior that results in disparate impact.¹⁶¹ The Court moved into a realm where the standard by which conduct is measured is a subjective determination of whether that behavior reflects an assertedly moral premise held by some segment of society. By refusing to rely on the more objective test of inferring discriminatory intent from purposeful infliction of disparate impact, the majority threatens the ability of disfavored groups to gain redress for violent and illegal infringements of their rights and creates a judicial system in which arbitrary fiat and doubt have displaced the concepts of objective legal principles and inalienable rights. As Justice Stevens observed, the Court has failed to meet the test put before it by the Forty-Second Congress. In his words, "In enacting such a law as section 1985(3) for federal courts to enforce, Congress asked us to see through the excuses—the 'rational' motives—that will always disguise discrimination. Congress asked us to foresee, and speed, the day when such discrimination, no matter how well disguised, would be unmasked."¹⁶²

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161. See *supra* note 98 and accompanying text.

162. *Bray*, 113 S. Ct. at 789 (Stevens, J., dissenting).